No. 80-350

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1980

SEA-LAND SERVICES, INC., and R.J. REYNOLDS INDUSTRIAL LEASING CORP.,

Petitioners,

vs.

JOHN MILOS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The instant action is a seaman's action for personal injuries. The plaintiff, John Milos, claimed that he slipped in a large accumulation of greasy food substance (probably a combination of ketchup and mayonnaise) and thereby aggravated a pre-existing (but asymptomatic) arthritic condition. The medical testimony showed "that Milos began to suffer debilitating pain

in his right hand and thumb, resulting finally in the surgery [fusion of the carpometacarpal joint] and rendering him unable to grasp or grip with that hand *only after* the fall in which he injured himself on board defendant's vessel in May, 1975" [A7,[1] *Milos v. Sea-Land Serv., Inc.,* 478 F. Supp. 1019, 1023 (S.D.N.Y. 1979)]. Plaintiff also "presented substantial proof establishing that, absent defendant's breach of duty, plaintiff would not have become disabled prior to the age of mandatory retirement" (A8; *Milos v. Sea-Land Service, Inc., supra,* 478 F. Supp. at 1023).

Defendants contended at trial that Milos' present disability would have occurred even absent the trauma and that Milos was not in fact disabled. The jury may have some understandable difficulty in accepting defendants' logically inconsistent factual claims. At any rate, defense counsel elected to pursue both positions and the resulting dilemma was of his own making.

Faced with the dispute between the parties as to causation and damages, the jury unanimously returned a verdict in favor of Mr. Milos and in the amount of $360,000. Defendants then moved for judgment notwithstanding the verdict or a new trial (basically on the same grounds now raised again in their petition) and the District Court denied the motion in its entirety. The opinion of the District Court, which is reported at 478 F. Supp. 1019 and also at pages A2-A21 of petitioners' appendix, reviewed the evidence and the parties' respective claims in detail. The District Court concluded:

> "We find defendant's position to be without merit, both on the record and as a matter of law. Three theories of liability were presented to the jury by the court; Negligence (Jones Act), Warranty of Seaworthiness, and Res Ipsa Loquitur.

1. All such references refer to pages in petitioners' appendix.

> The testimony at trial, by plaintiff himself and by supporting and opposing medical witnesses, presented substantial and convincing evidence that plaintiff had indeed suffered the accident he claims on May 5, 1975, that the accident was caused by defendant's negligence and/or breach of the warranty of seaworthiness, and that plaintiff's resulting disability to his right hand ultimately prevented him from continuing as a marine engineer" (A4-A5; 478 F. Supp. at 1021-1022).

Undaunted by the jury's rejection of their claims and the District Court's subsequent rejection of their claims, defendants appealed to the Court of Appeals for the Second Circuit raising the same arguments rejected by the trial court, *e.g.*, plaintiff was not disabled, plaintiff would have been disabled anyway, the award was excessive, the verdict was against the weight of the evidence and the charge incorrectly instructed the jury with respect to damages and causation. The Court of Appeals rejected defendants' arguments and unanimously affirmed (A22-A23).

Defendants next filed a petition for rehearing with the Court of Appeals. The petition was unanimously denied (A24). Defendants then submitted a petition for rehearing in banc. This petition was also denied by reason of "no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion" (A25).

Thus, defendants' present factual arguments were unanimously rejected by the jury, by the trial judge, and by the three judge panel of the Court of Appeals. In addition, no judge of the Court of Appeals, Second Circuit deemed defendants' arguments worthy of further review. And now defendants seek review by the Supreme Court of the United States with respect to those same arguments.

As might be expected, there are reasons why six jurors and four federal judges (Hon. Irving Ben Cooper, D.J.; Hon. William H. Timbers and Hon. Amalya L. Kearse, Circuit Judges; and Hon. Morris E. Lasker, District Judge Sitting by Designation) have unanimously rejected defendants' claims time and again. One reason is that defendants' presentations of the evidence adduced at trial have been, at the risk of understatement, grossly distorted. And here we refer not only to the instant petition but also to defendants' post-trial and appellate briefs. In this regard, Judge Cooper observed:

> "Counsel for the defendant, in his post-trial memorandum, continually invades the exclusive province of the jury, the sole fact-finders in this case. He takes unto himself its function, giving certain facts his weight, his estimate, and brushes aside other facts as though they did not exist" (A11, 478 F. Supp. at 1025).

We respectfully submit that Judge Cooper could have said a great deal more about defendants' "style" of selective review of the evidence.

We have no desire to waste this Court's time with an exhaustive presentation of evidence reviewed and re-reviewed by four competent judges who found no difficulties presented by the case. (Indeed, the Court of Appeals evidently concluded that the defendants' claims did not merit anything beyond summary order pursuant to Fed. R. App. Pro. 47). However, because we would not want this Court to conclude that the facts of this case have any relation to the "facts" presented in the petition, we address by way of example, the distortions in one small part of the petition, specifically, the very first page of the petition, page i, petitioners' Questions Presented for Review.

On the very first page of their petition, defendants make three factual claims which, to say the least, are inaccurate.

Defendants there claim: (1) "special damages [were] less than $700"; (2) prior to trial Milos "had worked for 17 continuous months without interruption, save for vacations, until one week before trial"; and (3) the "claimed 'injury' was never reported nor ever diagnosed." In point of fact, Milos lost at least $50,000 in past earnings (JA506-508)[2], including ten to fifteen thousand dollars in the three months following the injury (A10; 478 F. Supp. at 1024). As for the "continuous months without interruption", Milos missed work from May to August of 1975 during which time he was marked "not fit for duty" by the USPHS (JA481-482), was treated at the USPHS in Charleston, South Carolina in August of 1976, and missed work from July to December of 1977 while undergoing the fusion operation (A40, 478 F. Supp. at 1024). The evidence further indicated that Milos was in severe pain described as "excruciating" (JA431-432) and "terrible" (JA799) throughout the post-accident, pre-trial period. Finally, as to petitioners' claim that the injury was never reported or diagnosed, petitioners apparently forgot that Dr. Dale T. Bouton, a physician selected by defendants' own claims adjustor, examined Milos in August 1975 and served defendants with a report fully detailing the injury (Exh. 13). Petitioners also forgot that Milos testified as to pain in May of 1975 (JA488-489) and that such testimony was corroborated by Engineer John B. Ralph (JA1326, 1343). And petitioners "forgot" that x-rays of the thumb were ordered on June 6, 1975 (Exh. 11) and that every single doctor who testified at trial, including defendants' own Dr. Sidney A. Bernstein, agreed that such request indicated that Milos had made complaints regarding pain in that area as a result of his fall (JA763-766, 909-910, 1013-1016, 1466).

The "facts" as represented in the petition have little relation to the evidence adduced at trial. That evidence was reviewed by six jurors, one trial judge, and three appellate judges. No juror

2. All such references refer to pages in the joint appendix below.

or judge has yet concurred with petitioners' view of the evidence. No valid purpose would be served by further review. Certainly, the questions of credibility and the assessments of damages present a less than compelling basis for the grant of certiorari. Accordingly, respondents respectfully request that the petition be denied in all respects.

REASONS FOR DENYING THE WRIT

POINT I.

The charge to the jury and the jury's verdict have received more than adequate review.

As the Court well knows, the proper standard of causation in a maritime personal injury action is "any part, even the slightest." The rule was stated by this Court in *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506 (1957):

> "Under this statute [FELA and Jones Act] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played *any part, even the slightest,* in producing the injury or death for which damages are sought" (emphasis added).

There can be no question that the *Rogers* standard of causation remains good law.

Petitioners have repeatedly claimed that the jury was improperly instructed that the shipowner could beheld liable for damages its negligence did not contribute to in any part, even the slightest (*see, e.g.*, pages 17-22 of the petition). However, no such instruction was given. The District Court concluded that defendants were "entrapped in semantic distinctions" (A20, 478 F. Supp. at 1028) and that the charge instructed that "if the

defendants' acts merely advanced a disability that would have occurred in any event, the defendant is to be held liable in damages only for such advancement of the disability caused by it" (A9, 478 F. Supp. at 1024).[3] The Court of Appeals agreed

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3. In point of fact, it was defendant's burden of proof to show that the pre-existing quiescent condition would have disabled plaintiff absent the trauma imposed by defendant's breach of duty. *Steinhauser v. Hertz Corporation*, 421 F. 2d 1169, 1173 (2nd Cir. 1970); *Evans v. S.J. Graves & Sons Company*, 315 F. 2d 335, 347-348 (2nd Cir. 1963); *Kegel v. United States*, 289 F. Supp. 790, 796 (D. Mont. 1968). There was no evidence to suggest that the disability would have occurred absent the trauma. Dr. Golub testified that "there is nothing to suggest that he would have ever required surgery" (JA947-48), and Dr. Bouton stated that Milos would have gone on "indefinitely" without the need for surgical intervention (JA1097-99). Dr. Wickendon had no real opinion on the subject (JA1238) and nowhere stated that Milos was "bound to", or even "likely to" to require surgery absent the trauma. Defendant's expert, Dr. Bernstein, conceded causation attributable to the trauma (JA1459-60, 1464), but never said whether surgery would have resulted absent the trauma. Yet, the jury was instructed.

> "So you will readily recognize that the law emphasizes that before any plaintiff may claim damages, he must show that the claimed *injuries sustained resulted from the accident* and not from some other cause or for some other reason" (JA345) (emphasis added).
>
> "The plaintiff cannot recover damages from a defendant for *any physical condition, disability or consequential damages* which were not proximately caused by any *negligence* of the defendant or any *unseaworthiness* of the ship" (JA347) (emphasis added).
>
> "I might add, on the subject of *aggravation* of an existing condition. . . , in considering damages, you may *only* make an award for those injuries which were *caused by the shipowner's failure of legal responsibility*" (JA355) (emphasis added).
>
> "Aggravation in contemplation of law refers to those cases where a plaintiff already incapacitated to some degree

(Cont'd)

that "[t]he charge sufficiently instructed the jury that damages should be awarded to plaintiff only to the extent that his fall resulted in additional harm to his arthritic thumb" (A23). Evidently, petitioners' interpretation of the charge is unique.

Petitioners' view of the weight of the evidence is also unique as a reading of the opinions below demonstrates.

The jury's resolution of the questions of fact do not warrant further review.

POINT II.

The Court of Appeals' decision not to comment on all of petitioners' arguments does not indicate such arguments were not adequately considered.

Petitioners conclude that the Court of Appeals' decision to dispose of its appeal by summary order without discussion of each of the multitude of arguments raised indicates that the arguments were not adequately reviewed. This is a curious analysis. Obviously, the enactment of the provisions for disposition by summary order contemplated appeals unworthy of extended treatment. Evidently, the Court of Appeals deemed that petitioners' appeal qualified in the category of appeals unworthy of extended treatment. There is no reason to assume that the Court shirked its responsibilities and failed to consider petitioners' claims. Rather, the obvious conclusion is that the Court did read petitioners' brief and found the arguments raised therein not only devoid of merit, but utterly unworthy of discussion. We fail to see how this makes a case for review by the Supreme Court of the United States.

(Cont'd)

by a disease or an injury suffers a *worsened condition* as a result of defendants' wrongful act. In such cases the defendant is liable for the *additional harm that he caused,* even though a normal person's injury would have been less severe" (JA355-356) (emphasis added).

CONCLUSION

The legal interest rate is currently only 6%. 28 U.S.C. §1961; New York General Obligations Law, §5-501-1. As the Court. well knows, petitioners can currently invest plaintiff's award at a much higher rate of return. This, we suggest, adequately explains the petition.

We respectfully request that the petition be denied in all respects.

Dated: October 8, 1980
New York, New York

Respectfully submitted,

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